

**FILED**

**MAY 31 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

FIREMAN'S FUND INSURANCE  
COMPANY, a corporation; and  
FIREMAN'S FUND McGEE MARINE  
UNDERWRITERS, a corporation,

Plaintiffs - Appellants,

v.

SONITROL MANAGEMENT  
CORPORATION, d.b.a. SONITROL OF  
SAN DIEGO; and DOES 1-160, inclusive,

Defendant - Appellee.

No. 04-56170

D.C. No. CV 03-02289 JH (RBB)

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
John A. Houston, District Judge, Presiding

Submitted April 7, 2006<sup>\*\*</sup>  
Pasadena, California

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FARRIS and THOMAS, Circuit Judges, and SCHIAVELLI<sup>\*\*\*</sup>, District Judge.

Fireman's Fund Insurance Company and Fireman's Fund McGee Marine Underwriters appeal the district court's order granting Sonitrol Management Corporation's motion to dismiss. We consider, on our own motion, whether the order dismissing the complaint is appealable, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir. 1997) (en banc), and we dismiss this appeal for lack of appellate jurisdiction.

Generally, an order dismissing a complaint without prejudice is not appealable under 28 U.S.C. § 1291. *Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996). Here, the district court granted Sonitrol's motion to dismiss the complaint and expressly ruled it was without prejudice. By its nature, the district court's order would have permitted amendment of the complaint. Plaintiffs could have filed an election to stand on their pleading in the trial court and, thereby, invested this court with jurisdiction to proceed with the appeal. *Id.* Plaintiffs did not do so. Accordingly, we conclude that the district court's dismissal was not a final order, and we therefore lack jurisdiction to entertain the appeal.

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<sup>\*\*\*</sup> The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

**DISMISSED**